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Trade Regulation -- Stock Acquisition by Corporations -- Application of Section Seven of the Clayton Act

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Trade Regulation—Stock Acquisition by Corporations—Application of Section Seven of the Clayton Act

Paragraph one of section seven of the Clayton Act,[1] before the 1950 amendment, provided:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

In the recent case of *United States v. E. I. du Pont de Nemours and Co.*,[2] the United States Supreme Court, in a four to two decision, gave the above section a broader interpretation than had previously been given it. First, the Court held that the section applied to a vertical acquisition, in this case the acquired company being a buyer of the acquiring company's products; and, secondly, that the effect of the acquisition upon commerce was to be determined at the time the suit was instituted, rather than at the time the stock acquisition took place.

Although the 1950 amendment to section seven clearly proscribes vertical acquisitions,[3] the Court's holding in the *du Pont* case that the section before amendment covered vertical acquisitions is not rendered moot, because paragraph five of the amended section exempts transactions which transpired prior to passage of the amendment. Because the effect of the acquisition is to be determined as of the time suit is brought, the interpretation of section seven as it was written prior to the amendment remains a live issue since an acquisition which was made between 1914 and 1950 may become illegal at some future time due to changing circumstances.

In the *du Pont* case, the government alleged as violating section seven of the Clayton Act purchases by the du Pont Company between 1918 and 1920 of more than twenty-three per cent of the outstanding stock of General Motors, a total investment of approximately $49,000,000.[4]

[1] 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946).

[2] 353 U. S. 586 (1957).

[3] 64 STAT. 1125 (1950), 15 U. S. C. § 18 (1952), amending 38 STAT. 731 (1914), is in part as follows: "No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Emphasis added.)

[4] The government alleged violations of §§ 1 and 2 of the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1952), as amended, in addition to the alleged violation of § 7 of the Clayton Act.

The government conceded that the acquisition of General Motors stock by du Pont did not substantially lessen competition between the two companies and the amended complaint alleged only that the effect of du Pont's acquisition was ". . . to tend to create a monopoly in particular lines of commerce."[5] The Court reasoned that, since section seven was written in the disjunctive, it embraced three separate and distinct effects of a stock acquisition, citing *Aluminum Co. of America v. FTC*,[6] *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*,[7] and *United States v. New England Fish Exchange*.[8] In citing the *Aluminum* case, the Court relied on dictum because the court of appeals held that there was competition between the Aluminum Company of America and Rolling Mills Company, whose stock the Aluminum Company had acquired.[9] The *Fish Exchange* case is not directly in point because it was decided under paragraph two of section seven which applies to acquisitions by a company of the stock of two or more competitors,[10] although the wording of the two paragraphs is, for this purpose, identical. The *Ronald Fabrics* case is the only case which has been found to apply paragraph one of section seven to stock acquisitions where the acquiring and acquired companies were not in competition with each other. The *Ronald Fabrics* case was a private suit for treble damages by processor *A* against processor *B* which had bought supplier *C* and, by so doing, cut off *A* from his only source of supply.

During the thirty-five year period from the passage of the Clayton Act in 1914 until the commencement of the *du Pont* case in 1949, the Federal Trade Commission and the Justice Department, the agencies charged with enforcement of the act, had failed to bring a single case under section seven where there was no competition between the acquiring and acquired companies.[11] The failure of an administrative agency to invoke a purported power is a powerful indication that the power does not exist.[12] To lend force to the inference raised by the failure to so apply the statute for thirty-five years are statements by the FTC that interpret section seven as applicable to horizontal stock acquisi-

[5] 353 U.S. at 591.

[6] 284 Fed. 401 (3d Cir. 1922).

[7] 1946 Trade Cas. ¶ 57514, at 58374 (S. D. N. Y.).

[8] 258 Fed. 732 (D. Mass. 1919).

[9] 284 Fed. at 407.

[10] 258 Fed. at 746.

[11] Both the opinion of the Court (353 U.S. at 590) and the dissent (*id.* at 610) point this out.

[12] See FTC v. Bunte Bros., Inc., 312 U. S. 349, 351-52 (1941), where it was said, "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, *so want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.*" (Emphasis added.)

tions only.[13] Although no case has been uncovered which directly holds that section seven does not apply to vertical acquisitions of stock, in *International Shoe Co. v. FTC*,[14] it was held that section seven had not been violated because there was no substantial competition between the acquiring and acquired companies. In that opinion the Court said, "Obviously such acquisition will not produce the forbidden result if there is no pre-existing substantial competition to be affected."[15] In another case,[16] the complaint was dismissed upon a finding that no substantial competition existed either between the acquiring company and any of the acquired companies, or among the acquired companies. These cases appear significant in that they require, for a violation of section seven, competition between the acquired and the acquiring companies, something that does not exist between companies involved in a vertical acquisition.

As to the second point of the Court's decision, *viz.*, that the effect of the acquisition is to be determined as of the time suit is brought, it is noted that no authority was cited for that proposition. Prior to the *du Pont* case only one suit was brought invoking section seven where the acquisition had occurred more than three or four years before commencement of the suit.[17] In that case, a series of transactions was involved stretching from 1917 almost to the time the suit was begun, in 1948. Furthermore the suit was brought under the second paragraph of section seven of the Clayton Act, which applies to holding companies and makes illegal the acquisition of stock of two or more corporations ". . . where the effect of such acquistion, *or the use of such stock* . . . may be to substantially lessen competition between such corporations, or any of them . . . or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."[18] (Emphasis added.) The words, "or the use of such stock," seem to cover adequately a situation where the effect of the transaction upon commerce arises some time after the acquisition. The absence in paragraph one of section seven of the words, "or the use of such stock," might indicate that Congress did not intend that the effect of a stock acquisition prohibited thereby should be determined as of the time of suit.[19] To give

[13] FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 168 (1955).
[14] 280 U. S. 291 (1930).
[15] *Id.* at 298. From the point of view of the *du Pont* holding, this is dictum, since in *International Shoe*, the allegation that the acquisition tended to create a monoploy was not pressed on appeal, thus giving the Court no occasion to decide whether such an effect as alleged required competition between the acquired and acquiring corporations to come within the statute.
[16] In the Matter of Austin, Nichols & Co., 9 F. T. C. 170 (1925).
[17] 353 U. S. at 610-11 (dissenting opinion). The lone case was Transamerica Corp. v. Board of Governors, 206 F. 2d 163 (3d Cir. 1953).
[18] 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946).
[19] 353 U. S. at 620-21 (dissenting opinion).

to section seven the interpretation given to it by the Court in the *du Pont* case is to subject all companies acquiring stock in good faith to the hazard of having a legal transaction become illegal because of unforseeable developments,[20] an effect which Congress may be doubted to have intended.

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Trade Regulation—Unfair Competition—Dilution of Trade Marks

In *Esquire, Inc. v. Esquire Slipper Mfg. Co.*,[1] *Esquire* magazine sought to enjoin the defendant, a manufacturer of men's slippers, from using the word "Esquire" written in any manner whatsoever on its product, in its corporate name, or in its advertising. The plaintiff, in the words of the court, "seems almost to contend that the word 'Esquire,' except, usually abbreviated, as a form of address or title, as customarily used in addressing members of the bar, has as a practical matter disappeared from the English language except as the name of its magazine."[2] According to the opinion of the lower court in this case,[3] 5,000 persons in this country have adopted the word "Esquire" commercially, including barber shops, service stations, and cafes. Even before the plaintiff's trade-mark was registered, the name was registered for men's furnishings, pipes, toilet articles, watches, and writing paper. In the last few years, Esquire, Inc., has gone on an extended campaign to acquire exclusive rights for its mark. This campaign includes "friendly" letters, warnings of suit, and occasionally litigation. Apparently over 1,000 users of the word in unrelated fields have given up the mark under plaintiff's threats. The plaintiff has gone so far as to claim that it is protected against derivative words and that, therefore, "Squire's Home for Aged and Convalescent," "Squire Market," and "Squire Realty Co." are (or were) infringing on plaintiff's rights.[4]

Thus the question is squarely presented as to just how much protection the owner of a nationally advertised and nationally known mark is entitled to receive from users in unrelated or at best distantly related fields.

The plaintiff's hope for protection lies in an action for unfair competition of which trade-mark infringement is but a part.[5] Unfair competition is an expanding concept and in arriving at its present status has

[20] Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 220-21 (1953).

[1] 243 F. 2d 540 (1st Cir. 1957).
[2] *Id.* at 543.
[3] Esquire, Inc. v. Esquire Slipper Mfg. Co., 139 F. Supp. 228 (D. Mass. 1956).
[4] *Id.* at 231.
[5] Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1916).